SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 22, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

3958 American Building Supply Corp., Index 601562/08
Plaintiff-Respondent,

-against-

Petrocelli Group, Inc.,
Defendant-Appellant,

Pollak Associates,
Defendant.

_____

Keidel, Weldon & Cunningham, LLP, White Plains (Stephen C. Cunningham of counsel), for appellant.

Zisholtz & Zisholtz, LLP, Mineola (Stuart Zisholtz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 24, 2010, which denied defendant Petrocelli's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed as against Petrocelli. The Clerk is directed to enter judgment accordingly.

Plaintiff, who is in the business of selling and furnishing

construction building materials to general contractors in the New York metropolitan area, commenced this action, alleging that the defendant broker was negligent and in breach of contract based on its failure to procure insurance coverage specifically requested by the plaintiff. To recover damages for negligence or breach of contract against a broker based on the broker's failure to procure a particular type of coverage, the plaintiff must demonstrate that he or she made a specific request to the broker for that coverage (*Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 157-158 [2006]).

Issues of fact may exist with respect to whether the information provided by plaintiff -- a description of its business operations, a copy of the existing policy and its lease, and an apparent specific request for general liability coverage for its employees -- should have alerted defendant that the general liability policy obtained, which included a cross liability exclusion precluding coverage based on the injury of an employee, may not have provided the requested coverage (*see e.g. Kyes v Northbrook Prop. & Cas. Ins. Co.*, 278 AD2d 736 [2000]; *see also Herron v Grand Villa Resort, Inc.*, 2007 NY Slip Op 33208[U], 2007 WL 2988384 [2007]).

However, the presumption that a policy holder read and understood a policy of insurance duly issued to him or her

precludes recovery in this action (*see Busker on Roof Ltd. Partnership Co. v Warrington*, 283 AD2d 376, 377 [2001]; *McGarr v Guardian Life Ins. Co. of Am.*, 19 AD3d 254, 256 [2005]). Although the presumption may be overcome if there is wrongful conduct on the part of the broker, such as when the broker affirmatively misrepresents or fails to correct a misimpression regarding coverage (*see e.g. Baseball Off. of Commr. v Marsh & McLennan,* 295 AD2d 73 [2002]), there is no evidence of such an affirmative misrepresentation here.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Gonzalez, P.J., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

4259 The People of the State of New York, Ind. 2690/06
Respondent,

-against-

Carlos Lugo,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Denise Fabiano of counsel), and Willkie Farr & Gallagher LLP, New York (David M. Stoltzfus of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 26, 2009, convicting defendant, after a jury trial, of burglary in the first degree, and sentencing him to a term of 7 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant argues that the evidence shows he unintentionally entered an apartment while lunging at another person. However, the evidence warrants the conclusion that, acting with a continuing intent to commit the crime of assault, defendant deliberately entered the apartment in pursuit of his intended victim. Defendant traveled from the

apartment's doorway to its kitchen, where he stabbed another man who was trying to protect the intended victim.

The court properly declined to submit second-degree criminal trespass as a lesser included offense of burglary. There was no reasonable view of the evidence that defendant entered the building or the apartment unlawfully, while at the same time acting without the intent to commit a crime (*see People v Negron*, 55 AD3d 464, 465 [2008] *lv denied* 11 NY3d 928 [2009]). There is no evidence to suggest that defendant had any noncriminal purpose for making either entry.

Defendant's proposed response to a note from the deliberating jury was insufficient to preserve his present complaints about the court's supplemental instruction (*see People v Hoke*, 62 NY2d 1022 [1984]). We decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find the court provided a meaningful response that could not have caused defendant any prejudice.

Nothing in the prosecutor's summation warrants reversal (*see generally People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). The court properly exercised its discretion in denying defendant's mistrial motion, based on the prosecutor's comments on a witness's demeanor.

Those comments drew reasonable inferences, and did not imply that defendant had intimidated the witness. Defendant also objected to certain remarks as going outside the record. However, those remarks likewise drew reasonable inferences from the evidence. Defendant's remaining challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

The court properly exercised its discretion in denying the mistrial motion that defendant made after the prosecutor asked a witness an allegedly prejudicial question. At the court's direction, the prosecutor withdrew the question and the witness never answered it. We find that the unanswered question did not deprive defendant of a fair trial.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3491-
3491A In re Ancillary Receivership of Reliance Insurance Company. Index 405987/01

- - - - -

O'Brien & Gere Technical Services, Inc.,
Petitioner-Appellant,

-against-

New York Liquidation Bureau
(Reliance Insurance Company in Liquidation),
Respondent-Respondent.

_____

Sills Cummis & Gross P.C., New York (Philip R. White of counsel), for appellant.

London Fischer LLP, New York (James Walsh of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Michael D. Stallman, J.), entered November 27, 2009, which granted respondent's motion to confirm a Referee's report, inter alia, finding that petitioner is not entitled to coverage under the subject insurance policy and awarding petitioner $33,298.82 in attorneys' fees, and denied petitioner's motion to reject in part and confirm in part the Referee's report, respectively, unanimously modified, on the law and the facts, to the extent of increasing the award of attorneys' fees to $66,597.64, and otherwise affirmed, without costs.

Petitioner O'Brien & Gere Technical Services Inc. (Tech

Services), is a construction management company which was retained for a building project in Missouri in 1998. Respondent Reliance Insurance Company was subsequently placed into liquidation with outstanding claims transferred to the New York Liquidation Bureau (Insurer).

The undisputed facts of this case are as follows: After the general contractor Fru-Con/Fluor Daniel Joint Venture (JV) paid Tech Services more than $21 million, but before the project was completed, JV terminated its contract with Tech Services. Tech Services then commenced an action for recovery of damages in the United States District Court for the Eastern District of Missouri (2002 US Dist LEXIS 27733 [ED Mo 2002]). JV filed a counterclaim for breach of contract. The court awarded Tech Services more than $5 million on a quantum meruit basis. It dismissed JV's counterclaim but deducted approximately $1.3 million from Tech Services' award as a setoff for defective work. Specifically, the district court found defective work in the design of the buildings because of incorrect seismic analysis.

This setoff is the crux of the instant appeal. Tech Services submitted a claim to Insurer for the amount of the setoff characterizing it as "damages" incurred under an environmental liability policy. Tech Services was an additional named insured on the policy which had been issued to O'Brien &

Gere Engineers Inc. (Engineers), a separate corporate entity employed as a subcontractor on the project.

In June 2005, Insurer denied the claim. Subsequently, Tech Services moved for a review of Insurer's determination. The Referee found that the damages sought are of the type recoverable under the policy, but denied Tech Services' claim finding that it falls within the policy's "own work" exception. The Referee rejected Tech Services' argument that the claim is covered by the policy's professional liability provision. Supreme Court granted Insurer's motion to confirm the report and denied Tech Services' motion to confirm in part, and reject in part.

On appeal, Tech Services argues that the Referee's report correctly found that the setoff is recoverable damages under the policy, and that the Referee erred in denying it coverage under the professional liability provision of the policy. Insurer asserts that the Referee erred in finding that the setoff is recoverable under New York law or the policy, but that Referee correctly found that the claim does not arise out of Tech Services' rendering of professional services, and thus properly denied the claim. For the reasons set forth below we agree with Insurer's position in its entirety.

As a threshold matter, we note that while Insurer lost before the Referee on the issue of whether the setoff is

recoverable damages it received the relief it requested. Hence, Insurer moved to confirm the report, and did not cross-appeal from the orders below. As Insurer asserts, a prevailing party may raise, as a basis for affirmance, a point it lost in the court below provided that point was previously fully presented (*Matter of Nieves v Martinez*, 285 AD2d 410, 411 [2001]). Here, the issue was fully briefed and argued before the Referee, and expressly determined in the report. As such, it is properly before this Court.

Moreover, Insurer is right on the merits of the issue. The policy limits recovery to insured "damages" and "claims." Significantly, "damages" is defined as:

> "a monetary judgment, award or settlement of compensatory damages. DAMAGES does not include . . . equitable relief, or the return of fees or charges for services rendered or expense incurred by the INSURED for redesign, changes, additions or remedies necessitated by a CLAIM."

Claim is defined as: "a demand . . . for money or services."

Here, the setoff awarded by the Missouri District Court, and affirmed by the United States Court of Appeals for the Eighth Circuit (380 F3d 447 [8th Cir 2004]), was not a monetary judgment or compensatory damages for JV. Indeed, JV's counterclaim for breach of contract was dismissed in its entirety.

Instead, the district court, relying on *Kranz v Centropolis Crusher Inc.* (630 SW2d 140, 145 [Mo 1982]), noted that quantum

meruit recovery by the plaintiff may be reduced by "offsets for work which it demonstrates is defective" (*O'Brien & Gere Tech. Servs. v Fru-Con/Fluor Daniel Joint Venture*, 2002 US Dist LEXIS 27733, *48 [ED MO 2002]) and reduced plaintiff's recovery by amounts attributed to defective and imcomplete work, which, it is noted, is unequivocallly excluded from the definition of damages in the subject policy.

Moreover, it is well established that such a setoff is uninsurable as a matter of law. New York law is clear that the refund of monies to which a party is not entitled is not an insurable loss (*Millennium Partners, L.P. v Select Ins. Co.*, 68 AD3d 420 [2009]; *Reliance Group Holdings v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 188 AD2d 47, 54-56 [1993], *lv dismissed in part, denied in part* 82 NY2d 704 [1993]).

Tech Services' argument that the setoff arose from a claim of professional negligence and thus is covered by the subject policy's professional liability provision is equally without merit. The provision states that the policy applies to:

> "any act, error or omission in PROFESSIONAL SERVICES rendered or that should have been rendered by the INSURED or by any person for whose acts, errors or omissions the INSURED is legally responsible, and arising out of the conduct of the INSURED's profession."

The insured, that is, the claimant in this case, is Tech Services. It is undisputed that if there is professional

negligence then it is attributable to the engineering and seismic analysis work of Engineers, which Tech Services characterizes as its affiliate. Tech Services thus focuses on that portion of the provision that relates to coverage for the insured "or . . . any person for whose acts, errors or omissions [for whom] the insured is legally responsible."

However, by so doing Tech Services has overlooked the crucial portion of the provision that requires the acts, errors or omissions to arise from "the conduct of the insured's profession." As the Referee correctly found, Tech Services and Engineers are two separate corporate entities; and the acts, errors and omissions did not arise out of Tech Services' profession, which is construction management. The Referee noted that having taken the benefits of separate corporate form, Tech Services could not set it aside and claim the affiliate's profession as its own. While it is possible Engineers, as named insured, might have a claim under its policy, this is not at issue here. The Referee correctly concluded that Tech Services' claim fell outside the policy coverage. [1]

[1]While no longer relevant to the outcome of this case, it is worth mentioning that, because Tech and Engineers are two separate corporate entities, the Referee erred in applying the "own work" exception to Tech Services' claim since Engineers, not Tech, performed the faulty work.

Finally, the Referee misconstrued the legal defense costs provision of the policy in applying 50% of petitioner's unpaid legal expenses toward satisfying the policy "retention" (i.e., deductible), without determining whether the retention remained unsatisfied, even while observing that the retention was $250,000. It is undisputed that the retention had already been satisfied. Thus, petitioner should have been awarded 100% of its legal expenses.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, JJ.

4228 In re April Spencer, Index 402722/09
Petitioner,

-against-

The New York City Housing Authority, et al.,
Respondents.

_____

Steven Banks, The Legal Aid Society, New York (Sheryl Karp of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Adriana T. Luciano of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Byron S. Menegakis of counsel), for respondents.

_____

Determination of respondent New York City Housing Authority (NYCHA), dated July 22, 2009, which terminated petitioner's tenancy upon findings of non-desirability and breach of its rules and regulations, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Michael D. Stallman, J.], entered January 28, 2010), dismissed, without costs.

Termination of petitioner's tenancy is not shocking to one's sense of fairness (*see generally Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). The record shows that the conduct of petitioner and her adult son towards her upstairs neighbor, which included banging on the neighbor's floor from below, playing loud

music, threatening to injure the neighbor, summoning the police to the neighbor's apartment on numerous occasions, and filing a lawsuit against the neighbor, threatened the health, safety and welfare of the neighbor (*see Matter of Zeigler v New York City Hous. Auth.*, 35 AD3d 624 [2006]; *Matter of Alvarez v Hernandez-Pinero*, 211 AD2d 466 [1995]). Such conduct persisted even after multiple efforts by NYCHA to mediate the problem and notice to petitioner that continuance of such conduct would result in the termination of her tenancy.

When NYCHA determined the penalty, it did not improperly consider evidence of petitioner's conduct in a prior dispute with the prior tenants of the upstairs apartment. The hearing officer's decision indicates that she considered petitioner's conduct against the current neighbor in deciding the proper penalty.

We have considered petitioner's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4273-
4274 In re Transcorp Construction Corp., Index 602996/08
Petitioner-Respondent,

-against-

2093 Amsterdam Avenue, HDFC,
Respondent-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Marylin G. Diamond J.), entered on or about April 8, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 15, 2011,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: FEBRUARY 22, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4313 The People of the State of New York, Docket 21094C/09
Respondent,

-against-

Tammy Lang,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered April 6, 2009, convicting defendant, upon her plea of guilty, of assault in the third degree, and sentencing her to a term of 15 days, unanimously affirmed.

The misdemeanor information was not jurisdictionally defective (*see People v Kalin*, 12 NY3d 225, 232 [2009]). It charged all the elements of third-degree assault, and set forth sufficient factual allegations to warrant the conclusion that the victim suffered substantial pain. Accepting the allegations as true, a trier of fact could infer that when defendant punched the

victim in the face, she caused substantial pain (*see People v Henderson*, 92 NY2d 677, 679 [1999]; *see also People v Chiddick*, 8 NY3d 445, 448 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]), especially since defendant expressly announced her intent to injure the victim just before she punched her.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4314 Panatoz International Corp., Index 7526/05
Plaintiff-Respondent,

-against-

David Rozen, et al.,
Defendants-Appellants,

Luis Zeiguer, et al.,
Defendants.

_____

Wimpfheimer & Wimpfheimer, New York (Michael C. Wimpfheimer of counsel), for appellants.

Rothkrug Rothkrug & Spector, LLP, Great Neck (Simon H. Rothkrug of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, Bronx County (Edgar G. Walker, J.), entered February 4, 2010, which granted plaintiff's motion for summary judgment compelling defendants-appellants to cooperate with plaintiff's applications to the City of New York to erect a one-family home on its real property, unanimously affirmed, without costs.

Appellants' argument that the motion court lacked jurisdiction was not argued below and it is therefore unpreserved (*see e.g. Honique Accessories, Ltd. v S.J. Stile Assoc., Ltd.*, 67 AD3d 481, 482 [2009]). Were we to review this argument, we would find it unavailing because the owners of the four parcels in question took ownership subject to a document that contemplated

future court action. Similarly unavailing is appellants' contention that plaintiff failed to join necessary parties. There is no evidence that any of the entities or individuals identified by appellants are owners of the four parcels at issue (*see Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317, 318 [2006]).

Furthermore, it is undisputed that the owners of the four parcels in question took title to their respective parcels subject to a declaration, which states that each of the four parcels is permitted one dwelling unit to be maintained or constructed. Thus, the motion court was correct in its conclusion that pursuant to the declaration, appellants were required to cooperate with plaintiff in its applications to develop its parcel by executing the necessary consents.

We have reviewed appellants' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4315 Roopesh Khalian, Index 304452/08
Plaintiff-Appellant-Respondent,

-against-

New York University,
Defendant-Respondent-Appellant.

[And a Third-Party Action]

Cross-appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Stanley Green, J.), entered on or about July 20, 2010,

And said appeals having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated January 31, 2011,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: FEBRUARY 22, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4316 In re Dontay B.,

A Child Under the Age
of Eighteen Years, etc.,

Octavia F.,
Respondent-Appellant,

Donald B.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the child.

_____

Order of fact-finding, Family Court, New York County (Jody Adams, J.), entered on or about May 22, 2008, which, insofar as appealed from, found that respondent mother neglected the subject child by failing to provide him with adequate supervision and guardianship and proper medical care, unanimously reversed, on the law and the facts, without costs, the finding of neglect against the mother vacated, and the petition dismissed as against her.

The finding of neglect as against the mother was not supported by a preponderance of the evidence (Family Court Act

§ 1012[f]; § 1046[b][i]). The finding stems from an incident where the child's father struck the child in the face while the mother was at work. The father maintained that he hit the child by accident and there was no evidence that the father had previously hit the child or otherwise physically harmed him. Moreover, the domestic incident reports, which constitute the sole evidence of any violent propensities on the part of the father, were unsworn hearsay allegations (*see Matter of Christy C. [Jeffrey C.]*, 74 AD3d 561, 562 [2010]). Accordingly, there was no basis for a determination that the mother neglected the child by leaving him in his father's care while she was at work (*see Matter of P. Children*, 272 AD2d 211, 211-212 [2000], *lv denied* 95 NY2d 770 [2000]).

Although the father was later adjudicated to have committed the crime of endangering the welfare of a child, the record shows that the resulting physical injury was not serious, as evidenced by the testimony of petitioner agency's worker that the child did not need medical treatment. A single incident of excessive corporal punishment may constitute neglect (*see Matter of Rachel H.*, 60 AD3d 1060, 1061 [2009]), but the incident here was relatively mild and not part of a pattern. Therefore, the mother did not neglect the child in failing to remove him from the home in response to the single incident of excessive corporal

punishment by the father (*see Matter of Alexander J.S. [David S.]*, 72 AD3d 829, 830 [2010]; *see Matter of Charles N.*, 83 AD2d 947, 948 [1981]). Indeed, the agency implicitly recognized the mother's ability to care for the child when it agreed to parole him to her care (on condition that the father not be in the home), long before the conclusion of the fact-finding hearing.

Furthermore, the agency concedes that the evidence did not support the court's finding of medical neglect.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4318 M.N. Dental Diagnostics, P.C., as assignee of Daniel Burgos, Plaintiff-Respondent, Index 570775/07

-against-

Government Employees Insurance Company, Defendant-Appellant.

_____

Law Offices of Teresa M. Spina, Woodbury (Peter J. Molesso of counsel), for appellant.

Steven J. Neuwirth, Garden City, for respondent.

_____

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered June 24, 2009, which affirmed an order of the Civil Court, Bronx County (Julia I. Rodriguez, J.), entered on or about February 15, 2007, finding the issue of which insurer is the primary insurer must be submitted to arbitration, unanimously affirmed, with costs.

Insurance Law § 5105(b) requires that mandatory arbitration be used to resolve all disputes between insurers as to their responsibility for the payment of first-party benefits. 11 NYCRR 65-3.12(b) provides that "[i]f a dispute regarding priority of payment arises among insurers who otherwise are liable for the payment of first-party benefits, then the first insurer to whom notice of claim is given . . . shall be responsible for payment to such person. Any such dispute shall be resolved in accordance

with the arbitration procedures established pursuant to section 5105 of the Insurance Law and section 65-4.11 of this Part."

Defendant argues that its denial of benefits raised an issue of coverage, rather than of payment, because it was not "otherwise [] liable" for the payment of first-party benefits. However, 11 NYCRR 65-4.11(a)(6) provides that "any controversy between insurers involving the responsibility or the obligation to pay first-party benefits (i.e., priority [of] payment or sources of payment as provided in section 65-3.12 of this Part) is not considered a coverage question and must be submitted to mandatory arbitration under this section." Thus, as "the first insurer to whom notice of claim [was] given" (11 NYCRR 65-3.12[b]), defendant was responsible or obligated to pay the no-fault benefits for the health services provided by plaintiff, irrespective of any issues of priority or source of payment. By denying plaintiff's claim on the stated ground that no-fault benefits were payable by another insurer (Fidelity and Guaranty Insurance Co.), defendant raised an issue as to which insurer was obligated to pay first-party benefits, which "[c]learly . . . is

an inter-company dispute subject to mandatory arbitration" (*see Paramount Ins. Co. v Miccio*, 169 AD2d 761, 763 [1991], *lv denied* 78 NY2d 851 [1991]; *Matter of Pacific Ins. Co. v State Farm Mut. Auto. Ins. Co.*, 150 AD2d 455, 456 [1989]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4320 Milagros Collado, Index 21872/06
Plaintiff,

-against-

Antonio Cruz,
Defendant-Respondent,

Pichon III, Inc.,
Defendant-Appellant.

_____

Gannon, Lawrence & Rosenfarb, New York (Peter J. Gannon of counsel), for appellant.

Nicoletti Gonson Spinner & Owen LLP, New York (Pauline E. Glaser of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered July 23, 2010, which, to the extent appealed, denied defendant-appellant's motion for summary judgment dismissing the complaint and all cross claims against it, and granted in part defendant Cruz's cross motion for contractual indemnification, unanimously modified, on the law, to the extent of dismissing the complaint as to appellant, and otherwise affirmed, without costs.

Plaintiff tripped and fell on a broken sidewalk in front of a building owned by defendant Cruz and leased by defendant-appellant tenant for use as a grocery store. The lease provided at paragraph 30 that the tenant shall "make all repairs and replacements to the sidewalks and curbs adjacent thereto." The

tenant asserts that paragraph 4 of the lease and paragraph 58 of the Addendum to the lease made the tenant responsible only for non-structural repairs. Since the sidewalk flag needed replacement, the tenant asserts that the necessary repair was structural, and it was not responsible to correct the condition.

Administrative Code § 7-210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk, and it was undisputed that the tenant did not create the condition or make special use of the sidewalk. Provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff (*see Tucciarone v Windsor Owners Corp.*, 306 AD2d 162, 163 [2003]). Accordingly, the tenant's motion for summary judgment dismissing the complaint as against it should have been granted.

The tenant may be held liable to the owner for damages resulting from a violation of paragraph 30 of the lease, which imposed on the tenant the obligation to repair or replace the sidewalk in front of its store. Thus the motion court correctly denied the tenant's motion to dismiss the owner's cross claims against it.

The lease further provided, at paragraph 8, that "[t]enant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and

expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys fees paid . . . or incurred as a result of any breach by [t]enant . . . of any covenant or condition of this lease, or the carelessness, negligence or improper conduct of the [t]enant." This Court has held that almost identical language required the tenant to reimburse the owner only for damages not covered by any insurance policy, including insurance obtained by the owner (*see Diaz v Lexington Exclusive Corp.*, 59 AD3d 341, 342-343 [2009]). Thus, the tenant may be held liable to the owner if the owner has losses which are not reimbursed by the insurance policy the owner obtained. Accordingly, the motion court properly granted a conditional order of contractual indemnification in favor of the owner.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4321 Wilfredo Best, etc., et al., Index 350031/08
Plaintiffs-Appellants,

-against-

Dak Transportation Corp.,
Defendant-Respondent.

_____

Phillips, Krantz & Associates, LLP, New York (Heath T. Buzin of counsel), for appellants.

Malapero & Prisco, LLP, New York (Glenn E. Richardson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alan Saks, J.), entered on or about January 5, 2010, which, in an action alleging negligent supervision, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its prima facie entitlement to judgment as a matter of law in this action where infant plaintiff, a special needs child, was injured when he was attacked by another student while a passenger on a school bus owned and operated by defendant. Defendant's submissions included, inter alia, infant plaintiff's testimony that he and his assailant had been friends and that there had never been an altercation between them. Such testimony showed that defendant did not have specific knowledge or notice of the assailant's

acts, nor could they have been reasonably anticipated (*see Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *Guzman v City of New York*, 77 AD3d 570 [2010]).

In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs did not submit evidence indicating that defendant had notice of the assailant's dangerous conduct toward plaintiff or his propensity to engage in such conduct (*see Corona v Suffolk Transp. Serv., Inc.*, 29 AD3d 726 [2006]; *Michelle M. v Board of Educ. of City of N.Y.*, 3 AD3d 370, 372 [2004]), and defendant cannot be expected to guard against spontaneous acts that are "impulsive [and] unanticipated" (*Mirand* at 49; *see Jamal P. v City of New York*, 24 AD3d 301, 304 [2005]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4322 The People of the State of New York, Ind. 4154/00
Respondent,

-against-

Debra Peavey,
Defendant-Appellant.

_____

Iannuzzi & Iannuzzi, New York (John Nicholas Iannuzzi of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Shelia O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered July 30, 2009, sentencing defendant to a term of 1 year for failing to pay restitution imposed in a prior judgment of conviction, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

Defendant received proper notice under CPL 420.10(3) that she could be incarcerated if she failed to pay the full amount of court-ordered restitution. Although a subsequent restitution order made no mention of incarceration, and contained language to the effect that it superseded prior orders, that order was simply a payment schedule. It could not have been reasonably interpreted to mean that the possibility of incarceration for nonpayment had been removed. Moreover, the record establishes

that throughout the extensive proceedings relating to restitution, defendant was aware of that possibility.

The payment schedule directed defendant to pay 15% of her income and submit tax records. This was clearly not intended to mean that so long as she did not have any reportable income, she would have no restitution obligation. Defendant could not have reasonably interpreted this provision as relieving her of the duty to make good faith efforts to earn sufficient income to pay the full amount of restitution.

Defendant did not preserve her claim that under CPL 420.10(3) she was entitled to notice of her right to apply for resentencing, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. It is unnecessary to decide whether the statutory provision in question applies to restitution as well as fines. Even if the notice requirement applies to restitution, its purpose is to enable a defendant to obtain a hearing to determine his or her current ability to pay. Here, despite any lack of notice, defendant received such a hearing before a Judicial Hearing Officer at which the issue of defendant's ability to pay restitution was fully explored (*see People v Shields*, 238 AD2d 759, 760 [1997]).

When the court referred the matter to a JHO, the principal

issue to be determined was defendant's capacity to pay restitution, and the scope of the hearing did not exceed the reference. There is no merit to defendant's contention that she was deprived of notice that the hearing would encompass the issue of whether she made good faith efforts to earn sufficient income. The JHO conducted a thorough hearing at which defendant had a full opportunity to litigate all relevant matters, including her claim that she misunderstood the restitution order and her efforts to find employment.

The JHO properly determined that defendant was avoiding her restitution obligation. In sentencing defendant for nonpayment, the court considered the JHO's findings as well as memoranda of law submitted by the parties, and there was no need for another hearing. The record supports the court's conclusion that defendant failed to make a good faith effort to find remunerative employment, or to follow up on potential opportunities. In particular, the evidence warrants the inference that defendant had an employment relationship with her boyfriend that was structured to avoid generating on-the-books income. Since defendant failed to make good faith efforts to acquire resources to pay restitution, there was no need for the court to consider an alternative to incarceration (*see People v Vasquez*, 74 AD3d 462 [2010]).

We have and considered defendant's remaining statutory claims. Defendant's constitutional claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4323 American Home Assurance Company, Index 603610/05
Plaintiff,

-against-

BFC Construction Corp., et al.,
Defendants-Respondents,

Kent Affordable Housing, LLC, et al.,
Defendants,

Sirius America Insurance Company,
Defendant-Appellant.

_____

Brody, O'Connor & O'Connor, New York (Scott A. Brody of counsel), for appellant.

Schneider Goldstein Bloomfield LLP, New York (Donald F. Schneider of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 9, 2010, which, inter alia, granted the cross motion of defendants BFC Construction Corp. and Kent Waterfront Builders, LLC, for summary judgment as against Sirius on their second cross claim, declaring the obligation of Sirius to provide full indemnity to them in connection with the underlying personal injury action, and on their fifth cross claim for breach of contract, and set the matter down for a hearing on the issue of damages, unanimously affirmed, with costs.

The primary insured's forwarding of the summons and complaint in the underlying personal injury action to its

carrier, Sirius, constituted timely notice to Sirius of the claim involving the additional insured, since the interests of the named insured were not adverse to the interests of the additional insured (*see New York Tel. Co. v Travelers Cas. & Sur. Co. of Am.*, 280 AD2d 268 [2001]). Sirius' lengthy delays in disclaiming coverage, after it knew or should have known of the purported bases for disclaiming coverage based upon exclusions in its commercial general liability policy, were unreasonable as a matter of law, and thus ineffective (*see* Insurance Law § 3420[d]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4324 Dimitrios Tsamos, Index 20110/07
Plaintiff-Respondent,

-against-

Albatani Diaz, et al.,
Defendants-Appellants.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Friedman, Khafif & Sanchez, LLP, Brooklyn (Fabien A. Robley of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered April 12, 2010, which, in an action for personal injuries arising from a motor vehicle accident, denied defendants' motion for summary judgment, unanimously modified, on the law, to the extent of granting dismissal of plaintiff's 90/180 day claim, and otherwise affirmed, without costs.

On July 15, 2005, plaintiff was operating a company vehicle in the vicinity of Broadway and 122 Street. While stopped at a red light, the vehicle operated by plaintiff was struck from behind by a vehicle operated by defendant, Albatani Diaz, and owned by defendant, Cepin Livery Corp.

Supreme Court correctly denied the motion for summary judgment with regard to the statute's categories of "permanent consequential limitation of use of a body organ or function" and

"significant limitation of use of a body function or system" (Insurance Law § 5102 [d]). Defendants met their initial burden of demonstrating prima facie the absence of triable issues of material fact with their medical experts' opinions, based on, inter alia, examination of plaintiff and review of his MRIs, which demonstrated normal ranges of motion and attributed any limitations to causes other than the subject accident, such as plaintiff's age-related degenerative condition. In opposition, plaintiff raised triable issues of fact with his doctor's affirmation reviewing plaintiff's treatment from the time of the accident until 2009, including the results of range of motion tests performed a few days after the accident and then four years later. Plaintiff's physician's affirmation conflicted with defendants' expert's view as to the extent, effects, and causation of plaintiff's injury. Accordingly, summary judgment was properly denied with respect to these categories of alleged injury (*see Grill v Keith*, 286 AD2d 247 [2001]).

However, the court should have granted defendants' motion with respect to plaintiff's 90/180 day claim. In their moving papers, defendants relied on plaintiff's deposition testimony indicating that, at most, plaintiff missed a total of eight to

ten weeks of work on account of the alleged injury. Moreover, plaintiff's claim is not supported by concurrent medical evidence and the fact that the plaintiff alleges he is still on "light" duty is insufficient to raise a triable issue of material fact (*see Colon v Tavares*, 60 AD3d 419 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4327 The People of the State of New York, Ind. 3377/09
Respondent,

-against-

Melvin Morel,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel P. FitzGerald, J. at plea; Charles H. Solomon, J. at sentence), rendered on or about October 6, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: FEBRUARY 22, 2011

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4328 The People of the State of New York, Ind. 7608/02
Respondent,

-against-

Keith Foxworth,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Amy I. Donner of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

Order, Supreme Court, New York County (Roger S. Hayes J.), entered on or about October 26, 2007, which denied defendant's CPL 440.30(1-a) motion for DNA testing, unanimously affirmed.

CPL 440.30(1-a), which provides a procedure for convicted defendants to seek DNA testing, is inapplicable to persons who pleaded guilty (*People v LeBron*, 44 AD3d 310 [2007], *lv denied* 9 NY3d 1007 [2007]; *People v Byrdsong*, 33 AD3d 175 [2006], *lv denied* 7 NY3d 900 [2006]). Since defendant pleaded guilty, he may not avail himself of the provisions of the statute.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4329 Edward J. Simpson, Sr., et al., Index 22753/02
Plaintiffs-Respondents,

-against-

Moshe Montag, et al.,
Defendants-Appellants.

_____

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for appellants.

Scarcella Law Offices, White Plains (M. Sean Duffy of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered May 13, 2010, which, insofar as appealed from as limited by the briefs, in this action for personal injuries sustained in a motor vehicle accident, denied defendants' motion for summary judgment dismissing plaintiffs' claim that they sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence showing that plaintiffs' injuries were not the result of the subject accident. Although defendants' doctors did not examine plaintiffs until approximately eight years after the accident, the doctors, in

rendering their conclusions, also relied on medical evidence contemporaneous with the accident (*see Reyes v Esquilin*, 54 AD3d 615, 616 [2008]; *Uddin v Cooper*, 32 AD3d 270, 271 [2006], *lv denied* 8 NY3d 808 [2007]; *compare Rivera v Super Star Leasing, Inc.*, 57 AD3d 288, 289 [2008]).

In opposition, plaintiffs failed to raise a triable issue of fact. The fact that both plaintiffs missed more than 90 days of work is not determinative (*see Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 557 [2009]; *Uddin* at 271). Insurance Law § 5102(d) requires plaintiffs to be prevented "from performing substantially all of the material acts which constitute [their] usual and customary daily activities" for at least 90 of the first 180 days after the accident. Plaintiffs, however, offered no evidence that they were so restricted, other than their own statements, which were not supported by sufficient medical evidence (*see Colon v Bernabe*, 65 AD3d 969, 970-971 [2009]; *Nelson v Distant*, 308 AD2d 338, 340 [2003]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4331-
4331A Gilbert Lau, Index 102280/09
Plaintiff-Appellant,

-against-

7th Precinct of the Police Department
of the County of New York, et al.,
Defendants-Respondents.

_____

Gilbert Lau, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Michael Shender of counsel), for respondents.

_____

Order, Supreme Court, New York County (Karen S. Smith, J.), entered April 5, 2010, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered February 5, 2010, which denied plaintiff's motion to serve an amended complaint, unanimously affirmed, without costs.

Although defendants stated in their notice of motion that they sought an order pursuant to CPLR 3212 granting summary judgment, in the supporting affirmation, they argued that the complaint failed to state a cause of action (CPLR 3211[a][7]), and the exhibits annexed to the affirmation consist solely of pleadings. Upon analyzing the pleadings, the motion court granted defendants' motion "for summary judgment . . . dismissing

plaintiff's complaint for failure to state a cause of action."

Summary judgment was properly granted although the complaint could have been dismissed pursuant to CPLR 3211(a)(7). Also, plaintiff's argument that the court should have denied defendants summary judgment because the evidence raises issues of fact whether he had a special relationship with the police is unavailing. His General Municipal Law § 50-h hearing testimony is insufficient to establish the elements of such a relationship (*see Luisa R. v City of New York*, 253 AD2d 196, 203 [1999]; *Artalyan, Inc. v Kitridge Realty Co., Inc.*, 52 AD3d 405, 407 [2008]). Among other things, the police advised plaintiff that they could not help him in this matter and that he would be arrested if he continued to call them. In the face of this evidence, plaintiff cannot establish reasonable reliance upon any purported promise of police protection.

Plaintiff's proposed amended complaint failed to remedy the factual deficiencies in his original complaint (*Pacheco v Fifteen*

Twenty Seven Assoc., 275 AD2d 282, 284 [2000]; *Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404 [2006]).

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4332N In re Jerome Silverstein, etc., Index 119998/93
Petitioner-Respondent,

-against-

Max Goodman, et al.,
Respondents.
- - - - - -
Maurice Silverstein,
Nonparty Intervenor-Appellant.

_____

Stephen Latzman, New York, for appellant.

Eaton & Van Winkle LLP, New York (Jeffrey A. Asher of counsel), for Jerome Silverstein, respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered March 17, 2009, which, in this action involving a trust, denied proposed intervenor's motion for leave to intervene, unanimously affirmed, without costs.

This action was commenced by Jerome Silverstein in 1993 seeking to remove the Goodmans as trustees of a trust whose property consists of a building located in Manhattan. Following Jerome's death in 1999, his son Philip was appointed administrator of his father's estate and was substituted as petitioner of record herein. At the time of his death, Jerome had been residing in a rent-stabilized apartment in the building with his son Maurice, the proposed intervenor. In 2000, Maurice vacated the apartment and Philip and his family moved in.

In November 2007, this action was settled, with the parties agreeing to the sale of the building and to vacate possession of their respective units by no later than two weeks after the closing of the sale. Maurice now seeks leave to intervene, asserting that he has succession rights to his late-father's apartment that are threatened by the settlement.

The motion was not timely made as Maurice knew, as early as November 2003, when he opposed a motion made by the trustees in the action, that his tenancy rights to the apartment were at issue, yet he took no action until after the settlement (*see B.U.D. Sheetmetal v Massachusetts Bay Ins. Co.*, 248 AD2d 856, 857 [1998]). Furthermore, even if the motion were considered timely, Maurice would not be entitled to relief as his grounds for intervention rely on the existence of possessory rights to the apartment and he has failed to rebut the presumption of abandonment of any succession rights to the apartment (*see Hughes*

v Lenox Hill Hosp., 226 AD2d 4, 15-16 [1996], *lv denied* 90 NY2d 829 [1997]).

We have considered proposed intervenor's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4333 The People of the State of New York, Ind. 6355/06
Respondent,

-against-

Ernesto Valdez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (Paul S. Mishkin of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered July 10, 2007, convicting defendant, after a jury trial, of burglary in the first degree and assault in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 15 years and 7 years, respectively, unanimously affirmed.

The court properly precluded defendant from introducing the testimony of his three alibi witnesses, who were his family members and with whom he resided. Defendant offered his notice of alibi on the day of jury selection, without any showing of good cause for the delay (*see e.g. People v Ortiz*, 41 AD3d 114 [2007], *lv denied* 9 NY3d 879 [2007]; *People v Parson*, 268 AD2d 208, 208-209 [2000], *lv denied* 95 NY2d 837 [2000]).

We conclude that the failure to provide timely notice was the product of willful conduct by defendant that was motivated by his desire to obtain a tactical advantage (*see Taylor v Illinois*, 484 US 400, 414-415 [1988]; *Noble v Kelly*, 246 F3d 93 [2d Cir 2001], *cert denied* 534 US 886 [2001]; *People v Walker*, 294 AD2d 218 [2002], *lv denied* 98 NY2d 772 [2002]). The circumstances indicate that the belated alibi notice was a delaying tactic, especially since it came only after the court had rejected another last-minute attempt by defendant to delay the trial. Furthermore, the court gave defendant an ample opportunity to explain the circumstances of the belated notice.

Contrary to defendant's arguments, we also conclude that if the court had accepted the untimely alibi notice, the People would have needed a substantial adjournment of the trial, rather than conducting a midtrial investigation. Moreover, even with such a delay the People would still have been prejudiced because the passage of time was likely to have made the investigation difficult or futile (*see Wade v Herbert*, 391 F3d 135, 144-145 [2d Cir 2004]; *Parson*, 268 AD2d at 209).

Defendant claims that the People were on notice of a possible alibi defense from the inception of the case because his prior defense counsel had mentioned, during arraignment in Criminal Court, that defendant's brother would be a potential

alibi witness. However, counsel had also stated that the brother had said he was asleep at the time the crime occurred. As defendant did not further pursue the matter, the People had no reason to believe that his brother would be a witness (*see Wade*, 391 F3d at 144). Moreover, they had no notice of the other proposed witnesses.

The fact that prior counsel had already investigated an alibi defense and evidently found it unavailing also lends support to our finding that defendant was willfully attempting to delay the trial by reviving the alibi issue at the last minute.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4334 Prudential Equity Group, LLC, Index 105209/09
Petitioner-Respondent,

-against-

Jean Zivitz, etc.,
Respondent-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about October 19, 2009,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated February 1, 2011,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4335 Alicia M. Rodriguez, Index 307638/09
Plaintiff-Respondent,

-against-

Lipsig, Shapey, Manus & Moverman, P.C.,
Defendant-Appellant.

_____

Berson & Budashewitz, LLP, New York (Jeffrey A. Berson of counsel), for appellant.

Law Offices of Gerald P. Gross, Cedarhurst (Elliot B. Pasik of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Paul Victor, J.), entered December 24, 2009, which, in an action alleging legal malpractice arising out of defendant law firm's representation of plaintiff in an uninsured motor vehicle arbitration, denied defendant's motion for summary judgment dismissing the complaint, with leave to renew at the completion of discovery, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

In an action for legal malpractice, "a plaintiff must demonstrate that [he or she] would have succeeded on the merits of the underlying action but for the attorney's negligence" (*Davis v Klein*, 88 NY2d 1008, 1009-1010 [1996]; *see Dweck Law Firm v Mann*, 283 AD2D 292, 293 [2001]). An attorney's "selection of one among several reasonable courses of action does not

constitute malpractice" (*Rosner v Paley*, 65 NY2d 736, 738 [1985]).

Defendant established its entitlement to judgment as a matter of law by demonstrating that the associate who represented plaintiffs in the underlying arbitration was pursuing a reasonable strategy in not submitting repair bills and photographs that depicted damage consistent with the uninsured driver's testimony (*see Noone v Stieglitz*, 59 AD3d 505 [2009]; *Iocovello v Weingrad & Weingrad*, 4 AD3d 208 [2004]). In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's argument that the damage depicted in the photographs would have led the arbitrator to conclude that the uninsured driver was speeding, is insufficient speculation (*see Alter & Alter v Cannella*, 284 AD2d 138, 139 [2001]; *John P. Tilden, Ltd. v Profeta & Eisenstein*, 236 AD2d 292 [1997]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4336 In re Damon Bruce W., Jr., etc.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Yvonne M.G., etc.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Rosin Steinhagen Mendel, The Children's Aid Society, New York (Douglas H. Reiniger of counsel), for respondent.

Karen D. Steinberg, New York, attorney for the child.

_____

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about December 11, 2009, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed the custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Family Court's determination that the mother permanently neglected the child was supported by clear and convincing evidence. The record is replete with clear and convincing evidence that the agency exercised diligent efforts to strengthen the mother's relationship with the child (*see* Social Services Law

§ 384-b[7][a]). Those efforts included, among other things, furnishing the mother with a service plan tailored to her individualized needs and diligently fostering her reunification with the child by providing her with visitation, notice of the child's medical appointments, and referrals to various support and treatment programs. The efforts were exercised to no avail. The service plan required, among other things, that the mother complete a drug rehabilitation program and attend a CPR course for the child's special needs. The mother's recalcitrance was palpably demonstrated by the undisputed evidence that she failed to complete either program during the statutory period and failed to comply with random drug tests as required by the service plan (*see Matter of Elijah Jose S. [Jose Angel S.]*, __ AD3d __, 2010 NY Slip Op 09179, *1 [2010]; *Matter of Carol Anne Marie L. [Melissa L.]*, 74 AD3d 643, 644 [2010]). Clearly, this shows that the mother "substantially and continuously or repeatedly" failed to "plan for the future of the child" (Social Services Law § 384-b[7][a]).

Additionally, a preponderance of the evidence demonstrates that the child's best interests are served by terminating the mother's parental rights. The child has been living with his foster mother, who is his paternal aunt, since 2006. The foster mother has provided the child with a safe and nurturing home, and

the evidence indicates that she is attentive to the child's medical needs. In contrast, the mother admittedly failed to complete a drug rehabilitation program during the statutory period as well as a CPR training course, which could have been completed in a single day (*see Matter of Joaquin Enrique C. [Anna Julia F.]*, __ AD3d __, 2010 NY Slip Op 09340, *1 [2010]. The mother's request for a suspended judgment is unpreserved. Notwithstanding this, suspended judgment would not be warranted in light of the mother's testimony that her drug use never threatened the child's safety. This demonstrates the mother's failure to appreciate the gravity of her shortcomings and further substantiates that freeing the child for adoption was in his best interests (*see Matter of Juan A. [Nhaima D.R.]*, 72 AD3d 542, 543 [2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

CORRECTED ORDER - FEBRUARY 27, 2012

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4337 Marta Dones, Index 300001/08
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for appellant.

Spiegel & Barbato, LLP, Bronx (Brian C. Mardon of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered April 6, 2010, which denied defendant's motion for summary judgment dismissing the complaint and to strike certain allegations in plaintiff's verified bill of particulars, unanimously affirmed, without costs.

Plaintiff slipped and fell on water leaking from an exposed pipe in the bedroom of her apartment located in a building owned and operated by defendant NYCHA. Plaintiff's notice of claim alleged, inter alia, that defendant was negligent in causing and allowing the subject pipe steam/heater in her apartment to remain in a defective condition, leaking water, leaving the area "unguarded" and "unprotected," and "in failing to properly inspect and maintain said area."

Plaintiff's notice of claim fairly implied the allegations contained in plaintiff's bill of particulars relating to defendant's failure to place runners, mats, carpeting or other materials so as to cover, absorb or otherwise remove the water from the floor (*see Lopez v New York Hous. Auth.*, 16 AD3d 164 [2005]; *Melendez v New York City Hous. Auth.*, 294 AD2d 243 [2002]).

The testimony from defendant's heating plant technician regarding defendant's customary practice of not introducing water into the steam riser during a typical September month failed to satisfy defendant's burden of making a prima facie case of entitlement to summary judgment on the basis that it did not create the hazardous condition, since evidence of general procedures cannot satisfy such burden. Moreover, defendant did not submit evidence as to whether a malfunction had actually occurred that resulted in water flowing through the subject pipe (*see Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [2007]).

In light of plaintiff's testimony that she slipped on a puddle of water on her floor that had become wet due to a leaking pipe, that she had repeatedly complained to defendant about the leaking pipe, and that defendant had inspected the pipe on four to five occasions prior to the accident, we conclude that there

exist triable issues on the question of actual or constructive notice (*see Talavera v New York City Tr. Auth.*, 41 AD3d 135 [2007]).

We have considered defendant's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4338-
4339 Laura Vazquez, et al., Index 115513/07
Plaintiffs-Appellants,

-against-

JRG Realty Corp., et al.,
Defendants-Respondents.

_____

Profeta & Eisenstein, New York (Fred R. Profeta Jr., of counsel), for appellants.

Kaufman, Borgeest & Ryan, LLP, New York (Dennis J. Dozis of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered October 1, 2009, dismissing plaintiffs' complaint in its entirety, and bringing up for review an order, same court and Justice, entered July 23, 2009, which granted defendants' motion for summary judgment, and order, same court and Justice, entered November 25, 2009, which, to the extent appealable, denied plaintiffs' motion to renew the order entered July 23, 2009, unanimously affirmed, without costs.

In this trip and fall action, the motion court properly found that defendants demonstrated their prima facie entitlement to summary judgment by showing that the defect plaintiff Laura Vazquez alleged she tripped on was trivial (*see e.g. Trincere v County of Suffolk*, 90 NY2d 976 [1997]; *Burko v Friedland*, 62 AD3d

462 [2009]) and that plaintiffs, in opposition, failed to demonstrate an issue of fact that would preclude summary judgment. Plaintiff Laura Vazquez's testimony that the defect was three-quarters of an inch to one inch in height was speculative, since she did not measure the defect herself and she presented no expert testimony. Defendant's witnesses stated that the area was nearly flat and their expert measured the defect and found it to be the height of a nickel.

No appeal lies from the denial of a motion to reargue (*DiPasquale v Gutfleish*, 74 AD3d 471 [2010]). Supreme Court also properly denied the motion to renew, as the expert affidavit proffered on renewal was available to plaintiffs prior to the summary judgment motion being fully submitted (*see e.g. Estate of Brown v Pullman Group*, 60 AD3d 481 [2009], *lv dismissed and denied* 13 NY3d 789 [2009]). In any event, plaintiffs' expert affidavit was speculative, conclusory, and not based on

foundational facts, i.e., an exact measurement of the purported defect, and thus was insufficient to create an issue of fact (*Pappas v Cherry Cr., Inc.*, 66 AD3d 658 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4340 The People of the State of New York, Respondent, Ind. 239/08

-against-

Angelo Bonilla, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Amy Donner of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Herbert Adlerberg, J.H.O. at suppression hearing; Charles H. Solomon, J. at suppression ruling, plea and sentence), rendered July 29, 2008, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 4½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant alleges on appeal that physical evidence and statements should have been suppressed as fruits of an unlawful vehicle stop. However, defendant did not preserve these claims, and the suppression court did not "expressly decide[ ]" (CPL 470.05[2]) the particular issues raised on appeal (*see People v Turriago*, 90 NY2d 77, 83-84 [1997]; *see also People v Colon*, 46 AD3d 260, 263

[2007]). We decline to review these unpreserved claims in the interest of justice. As an alternative holding, we also reject them on the merits.

An officer saw defendant sitting behind the wheel of a car parked in a bus stop. Defendant's car remained in the bus stop for several minutes before driving away, and there is no evidence that defendant was receiving or discharging passengers. Accordingly, it is clear that defendant was parked illegally, and his arguments to the contrary are without merit. Therefore, the police lawfully stopped the car on that basis (*see Whren v United States*, 517 US 806 [1996]; *People v Robinson*, 97 NY2d 341 [2001]).

In addition, while defendant was parked, the officer saw defendant engage in furtive hand motions with a man who approached his car. Based on her experience, the officer recognized a pattern of suspicious actions indicative of a drug

transaction (*see People v Jones*, 90 NY2d 835 [1997]). Accordingly, the police had reasonable suspicion upon which to stop defendant's car on that basis as well.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4341 Arsim Kameraj, Index 308670/08
Plaintiff-Appellant,

-against-

Haim Joseph,
Defendant-Respondent.

_____

M. Douglas Haywoode, Brooklyn, for appellant.

Marshall, Conway, Wright & Bradley, P.C., New York (Lauren Turkel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered June 2, 2009, which, in an action for personal injuries, granted defendant's motion to dismiss the complaint as barred by the statute of limitations, unanimously affirmed, without costs.

It is undisputed that plaintiff served the summons and complaint on defendant after the applicable three-year statute of limitations had expired (*see* CPLR 214[5]). The motion court correctly found that, for purposes of the relation-back doctrine, defendant was not united in interest with the timely sued

corporation because defendant could raise the defense that he is not personally liable for the corporate party's conduct (*see Raymond v Melohn Props., Inc.*, 47 AD3d 504 [2008]).

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Sweeney, Acosta, Renwick, Manzanet-Daniels, JJ.

4342 John R. Liegey, Index 111458/04
Plaintiff-Respondent,

-against-

Diane Gerardi,
Defendant-Appellant,

Carolyn Gerardi, et al.,
Defendants.

_____

The Feldman Law Firm, P.C., New York (Alex Jonatowski of counsel), for appellant.

Robert F. Wayburn, New York, for respondent.

_____

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered April 8, 2009, after a nonjury trial, awarding plaintiff the principal sum of $61,000 against defendant Diane Gerardi, unanimously affirmed, without costs.

Defendant failed to show that no fair interpretation of the evidence supports the trial court's finding that the ring was given to her in contemplation of marriage (*see Matter of Allen v Black*, 275 AD2d 207, 209 [2000]; *Matter of Sonia C. [Juana F.]*, 70 AD3d 468, 468-469 [2010]).

We have considered defendant's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4345 Springwell Navigation Corp., Index 600600/09
Plaintiff-Respondent,

-against-

Sanluis Corporacion, S.A.,
Defendant-Appellant.

_____

Wilk Auslander LLP, New York (Julie Cilia of counsel), for appellant.

Kasowitz Benson Torres & Friedman LLP, New York (Kim Conroy of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered December 16, 2009, to the extent it denied defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

Since this Court's dismissal of the prior action for lack of standing (46 AD3d 377 [2007]) was not a final determination on the merits for res judicata purposes, plaintiff is not precluded from reasserting the same claims based on newly conferred rights that cured the lack of standing (*see e.g. Pullman Group v Prudential Ins. Co. of Am.*, 297 AD2d 578 [2002], *lv dismissed* 99 NY2d 610 [2003]). Nor, for collateral estoppel purposes, is the issue raised in this action identical to the issue "necessarily decided" in the prior appeal (*see Matter of Hofmann*, 287 AD2d 119, 123 [2001]). The issue decided against plaintiff in the

prior appeal was whether plaintiff had standing as a beneficial owner to sue on either the indenture or the note. The issue now before us is whether plaintiff has standing, as the registered holder's authorized appointee, to bring suit on the indenture.

As the indenture expressly permits the registered holder to assign its right to institute any legal action to an appointed proxy, and plaintiff has obtained the registered holder's authorization to sue in its stead, plaintiff's status has changed, and its prior lack of capacity has been cured (*see e.g. Allan Applestein Trustee F/B/O D.C.A. Grantor Trust v Province of Buenos Aires*, 415 F3d 242 [2d Cir 2005]).

We have considered defendant's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4346 The People of the State of New York, Ind. 3341/08
Respondent,

-against-

Jose Burgos,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Denise Fabiano of counsel), and Dewey & LeBoeuf LLP, New York (Mayur R. Patel of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Vincent Rivellese of counsel), and Patterson Belknap Webb & Tyler LLP, New York (Todd S. Keithley of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered December 22, 2008, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The People met their initial burden of coming forward, and defendant did not meet his ultimate burden of proving the illegality of the search and seizure (*see People v Berrios*, 28 NY2d 361, 367 [1971]).

The police lawfully searched defendant's backpack as incident to a lawful arrest. The officer's testimony, and the reasonable inferences that may be drawn therefrom, establish that

the arrest and search were contemporaneous, that the backpack remained in defendant's grabbable area, and that it was not in the exclusive control of the police (*see People v Smith*, 59 NY2d 454 [1983]; *People v Wylie*, 244 AD2d 247 [1997], *lv denied* 91 NY2d 946 [1998]; *compare People v Gokey*, 60 NY2d 309 [1983]). The police properly inspected the backpack for their own safety and to prevent any possible loss, destruction or alteration of evidence. The backpack was large enough to conceal a weapon, and the officer had just seen defendant stealing merchandise and placing it in the backpack. We have considered and rejected defendant's remaining arguments, including his procedural claims.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4347 Jeffrey Katz, Index 100574/09
Plaintiff-Appellant,

Fabiola Colas,
Plaintiff,

-against-

Quality Building Services,
Defendant-Respondent.

_____

Herbert Katz, New York, for appellant.

Clifton Budd & DeMaria, LLP, New York (Laura Scully of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 7, 2009, which, inter alia, granted defendant's motion to dismiss the complaint pursuant to CPLR 3211 for failure to state a cause of action, unanimously affirmed, without costs.

Defendant's alleged continuous failure to check the legal employment status of applicants as required by the U.S. Immigration Reform and Control Act of 1986 as amended in 2006 did not create a substantial and specific danger to the public health or safety within the meaning of Labor Law § 740. Accordingly, the court properly dismissed plaintiff's action alleging retaliatory discharge in violation of Labor Law § 740 (*see*

Cotrone v Consolidated Edison Co. of N.Y., Inc., 50 AD3d 354 [2008]; *Peace v KRNH, Inc.*, 12 AD3d 914 [2004], *lv denied* 4 NY3d 705 [2005]).

We reject the parties' remaining contentions.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4348 John B. Stetson Company, Index 600074/10
Plaintiff-Appellant,

-against-

Joh. A. Benckiser GmbH, et al.,
Defendants-Respondents.

_____

Wollmuth Maher & Deutsch LLP, New York (Frederick R. Kessler of counsel), for appellant.

Kilpatrick Townsend & Stockton LLP, New York (Lisa Pearson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered August 17, 2010, which granted defendants' motion to dismiss the complaint to the extent it alleges that defendants breached the parties' license agreement by failing to actively market or sell the licensed products in every country and jurisdiction in the world, unanimously affirmed, with costs.

In 1980, plaintiff and Pfizer, Inc., defendants' predecessor-in-interest, entered into a License Agreement that imposed upon Pfizer, as Licensee, the duty to "actively promote, advertise and sell [the Licensed Products] in each country or jurisdiction within the Territory," which was comprised of the United States and Canada. In 1986, plaintiff and Pfizer executed an Amendment to the License Agreement, of which section 5, called "Redefinition of the Territory," provides that "the 'Territory'

shall mean all countries and jurisdictions of the world, subject to Section 9 of this Amendment." Section 9 provides for the licensing of Stetson products in "Foreign Territories," which it defines as the whole world outside of the United States and Canada.

Plaintiff contends that the Amendment expanded the territory in which defendants have a duty to actively promote and sell the Licensed Products to include all the countries of the world, and alleges that defendants breached this duty by failing to "actively promote, advertise and sell" the Licensed Products in any "Foreign Territory." We reject plaintiff's interpretation of the Amendment as strained and contrary to the plain language of the Amendment.

Section 9 authorizes defendants to engage in "Active Marketing" of the Licensed Products in any Foreign Territory in which they wish to secure exclusive rights to sell the products. It provides, inter alia, that, once advised of plaintiff's receipt of a third party's "Bona Fide Offer" to enter into a license agreement to sell the Licensed Products in a given Foreign Territory, defendants may choose to engage in Active Marketing in that territory, within a specified time period, to preclude plaintiff from granting a license to the third party for that territory — but they are not required to do so. Because the

redefinition of Territory to mean "all countries and jurisdictions of the world" was made subject to section 9, "Foreign Territories," we find that the duty to "actively promote, advertise and sell" applicable to the original Territory, is superseded, with respect to Foreign Territories, by the more specific Active Marketing scheme set forth in section 9 (*see Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]).

We reject plaintiff's contention that, rather than establishing a comprehensive regime governing the parties' rights and obligations in the Foreign Territories, Section 9 provides a procedure by which plaintiff, after receiving a third party's Bona Fide Offer to engage in Active Marketing in a Foreign Territory, can "claw back" licensing rights in that territory. Section 9(c) contemplates that defendants may already be engaging in Active Marketing in a Foreign Territory when plaintiff receives a Bona Fide Offer, thus refuting plaintiff's contention that Section 9 is triggered by a Bona Fide Offer. In addition,

section 9(d) requires defendants to provide 90 days' advance notice of their intention to engage in Active Marketing in a given Foreign Territory, which would be unnecessary if section 9 applied only in the context of third-party Bona Fide Offers.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4350 Dalia Genger, Index 302436/02
Plaintiff-Appellant,

-against-

Arie Genger,
Defendant-Respondent.

_____

Yankwitt & McGuire, LLP, White Plains (Harold F. McGuire, Jr. of counsel), for appellant.

Dobrish Zeif Gross, LLP, New York (Robert Z. Dobrish of counsel), for respondent.

_____

Order, Supreme Court, New York County (Laura Drager, J.), entered November 6, 2009, which granted plaintiff's motion to compel production of documents pursuant to a stipulation of settlement of the parties' divorce action only to the extent of documents reflecting marital assets that were not listed on the marital balance sheet and were not the subject of the previous audit and ensuing arbitration and only upon plaintiff's furnishing a reasonable basis to believe such unlisted assets existed, and ordered the parties to execute a confidentiality agreement in connection with the production, unanimously modified, on the law, to grant the motion to compel without restriction or limitation, and otherwise affirmed, without costs.

While recognizing that, pursuant to the stipulation, plaintiff is entitled to further audits as to the completeness

and accuracy of the marital assets and liabilities contained on the marital balance sheet as of January 31, 2002 and valued as of October 26, 2004, the court impermissibly restricted the scope of these audits, essentially rewriting the stipulation by imposing additional terms (*see Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith*, 85 NY2d 173, 182 [1995]). The stipulation is patently unambiguous and clearly evinces the parties' intent (*see Chimart Assoc. v Paul*, 66 NY2d 570, 574 [1986]). It contains no restriction or limitation on the scope of the audits. The court was not at liberty to alter or change any of the provisions of the stipulation without the consent of both parties (*see Leffler v Leffler*, 50 AD2d 93, 95 [1975], *affd* 40 NY2d 1036 [1976]).

Defendant is bound by the contents of the stipulation (*see Da Silva v Musso*, 53 NY2d 543, 550 [1981]). His assertions are insufficient to rebut "the heavy presumption that a deliberately prepared and executed written instrument manifested the true intention of the parties" (*Merrick v Merrick*, 181 AD2d 503 [1992] [internal quotation marks and citation omitted]).

We agree with the court that, under the circumstances, a

confidentiality agreement in connection with the document production is warranted (*see generally Mt. McKinley Ins. Co. v Corning Inc.*, 77 AD3d 453 [2010]). Moreover, plaintiff's counsel consented to the confidentiality agreement on the record in open court.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4351 The People of the State of New York, Ind. 1823/08
Respondent,

-against-

Venturo Cruz,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about January 21, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: FEBRUARY 22, 2011

CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4352N Sirius American Insurance Company, et al., Plaintiffs-Respondents, Index 600785/04

-against-

Burlington Insurance Company, Defendant-Appellant,

K.J.S. Construction Inc., et al., Defendants.

_____

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (James M. Adrian of counsel), for appellant.

Rubin, Fiorella & Friedman LLP, New York (Mandie R. Forman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about March 18, 2008, which, to the extent appealed from, as limited by the briefs, denied defendant-appellant Burlington Insurance Company's (Burlington) cross motion for summary judgment dismissing the amended complaint as against it and for a declaration that the insurance policy Burlington issued to its insured, defendant K.J.S. Construction Inc. (KJS), was void based on material misrepresentations, and granted plaintiffs' motion for a declaration that the policy was still in effect at the time of the worker's alleged accident

and declared that Burlington's disclaimer of coverage to plaintiff Sirius American Insurance Company (Sirius) was untimely as a matter of law under New York Insurance Law § 3420(d), unanimously modified, on the law, the cross motion granted to the extent of declaring that the Burlington policy was void ab initio due to material misrepresentations made in the application process, and that branch of plaintiff's motion which sought a declaration that the policy was still in effect at the time of the worker's accident denied, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Burlington, as cross movant for summary judgment, established prima facie entitlement to such relief by proof that plaintiff general contractor Artimus Construction, Inc. (Artimus) was not named on the face of its policy issued to subcontractor KJS as a named insured or additional insured (*see Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198 [2004]; *cf. Majawalla v Utica First Ins. Co.*, 71 AD3d 958 [2010]). The burden having shifted, Artimus, as the party claiming insurance coverage, offered inadequate evidence to raise a triable issue of fact as to whether it was entitled to such coverage (*see Tribeca Broadway Assoc.*, 5 AD3d at 200; *York Restoration Corp. v Solty's Constr., Inc.*, __ AD3d __, 2010 NY Slip Op 9254 [2010]). Even

assuming, arguendo, that Artimus had demonstrated a triable issue of whether it was a covered insured under the KJS/Burlington policy, such showing would have been unavailing as the policy was void ab initio on account of material misrepresentations made by KJS in the application process to procure the insurance (*see generally* Insurance Law § 3105(b); *Precision Auto Accessories, Inc. v Utica First Ins. Co.*, 52 AD3d 1198 [2008], *lv denied* 11 NY3d 709 [2008]; *Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD3d 412 [2009]). A representative from Burlington's underwriter averred, inter alia, that Burlington would not have insured risks associated with KJS's undisclosed demolition work, particularly where the building exceeded four stories in height. The representative's statements were corroborated by internal underwriting documentation, including evidence of a standard exclusion that precluded recovery for bodily injury arising from demolition work in buildings exceeding four stories (*see generally Curanovic v New York Cent. Mut. Fire Ins. Co.*, 307 AD2d 435 [2003]).

Since this is a declaratory judgment action, we declare in Burlington's favor, but do not dismiss the amended complaint (*see*

200 Genesee St. Corp. v City of Utica, 6 NY3d 761, 762 [2006]).

We have considered the parties' remaining arguments and find them moot and/or unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2011

CLERK